inherent right so to do, and is responsible for personal injuries caused by its wrongful act. Nor is the force of *Little* v. *Madison* broken by the later cases of *Little* v. *Madison*, 49 Wis. 605, and *Cole* v. *Newburyport*, 129 Mass. 594; for in both of these cases the allegation and proof were that the accident happened while the animals were traversing the streets, and not in the places where the city had authorized them to be exhibited. In the former the decision was rested on its being a case where the *police* officers neglected to prevent the owners of the beasts making an improper use of the streets.

The principal case is then an important one, as resting the decision of what is or is not a nuisance in the minds of the town council rather than in the court or jury, while at the same time it decides that coasting not being a nuisance *per se*, "the municipal authorities must have a discretion when and where the sport should be allowed, and when and where forbidden."

WILLIAM DRAYTON.

Supreme Court of Iowa.

QUINN *v.* CHICAGO, B. & Q. RAILROAD CO.

One whose foundation walls are injured by water percolating through the soil from an adjoining lot has a cause of action against the owner thereof if the water was unlawfully or unreasonably allowed to remain standing thereon, and not otherwise.

Damages to the owner or occupant of land by reason of a diminution of the value thereof caused by a neighboring nuisance must be confined to the time during which the nuisance existed.

APPEAL from Polk Circuit Court.

Action for damages alleged to have been sustained by reason of a nuisance caused by an excavation in the earth, and by water collecting and standing therein. A verdict and judgment were rendered for the plaintiff, and the defendant appealed.

Parsons & Runnells, for appellant.

Henry S. Wilcox, for appellee.

The opinion of the court was delivered by

ADAMS, J.—The plaintiff owns and resides upon a certain lot in the city of Des Moines. The defendant owns a lot adjoining. In the construction of its road earth was taken from its lot and a large excavation made. Water collected and stood therein, and, according to the evidence, rendered the plaintiff's premises less desirable as a residence, and caused some permanent damage

to the plaintiff's cellar walls, and to the foundation of her house.

The defendant asked the court to instruct the jury in these words: "You are instructed that no damages can be recovered by the plaintiff, except such as resulted from the fact that the excavation made by the defendant upon its lot was, at the time of such damage, a public nuisance; and any damage caused to the property of the plaintiff by the mere fact that the excavation contained water which undermined the plaintiff's house, should not be considered by you in estimating the damages which she is entitled to recover." The court refused to so instruct, and the refusal is assigned as error.

The instruction is not entirely clear; but as we understand it, it would, if given, have excluded all damages sustained from the undermining of the house. The evidence shows that such damages, if any, resulted from water percolating through the soil. The rule is well settled that no action can be maintained for the diversion of percolating water, where the act of diversion is done by the owner of the premises where done, and is done in good faith. But the injury complained of in this case did not arise from the diversion of percolating water from where it was wanted, as from a well or spring, but from so collecting water that it reached, by percolation, to where it was not wanted, to wit, to a cellar and to the foundation walls of a house.

Our attention has been called to no case where the precise question presented has been decided. On principle it would seem that the plaintiff ought not to recover for such damage if it resulted from the lawful and reasonable use by the defendant of its own lot. How far the plaintiff's house was from the line between her lot and the defendant's does not appear; but the evidence shows that it was near. It shows that it was only four feet between the house and the excavation. If the distance between the house and the line was not such as to afford immunity against water percolating from the defendant's lot, it was the fault of the person who built the house, unless the water was collected and suffered to stand on the defendant's lot through some unlawful or unreasonable use or sufferance. Such use or sufferance the owner of the injured premises was not, we think bound to anticipate, and consequently was not bound to provide against. It is true that there was no necessary connection between the condition of the water which made it a nuisance, if it was such,

and the injury sustained from the undermining of the house; yet it cannot be denied that the length of time during which the water was allowed to stand, was among other things the cause of both. It is to be observed, also, that during the continuance of the nuisance the defendant was without excuse in suffering the water to remain. The defendant was under constant obligation to remove it and the plaintiff had reason to suppose that it would remove it. During that time it was not for the defendant to say that the injury being sustained by the plaintiff was not actionable, because merely incidental to the exercise by the defendant of its own rights.

While we think that the instruction asked went too far, and was properly refused, the court should, we think, have submitted the question as to whether the defendant became guilty of a nuisance, as alleged in the petition, and should have instructed the jury that in case they so found they might allow the plaintiff for such injury as her premises sustained from the percolation of water from the excavation after the same became and while it remained a nuisance.

The court allowed the plaintiff to introduce evidence to the effect that she and her family suffered great discomfort from the offensive condition of the water collected on the defendant's lot, and that the rental value of the premises was reduced from nine dollars a month to nothing. The court gave an instruction in these words; "Your inquiry will be from March 27th 1880, to June 13th 1882." As to what the court meant we are somewhat uncertain. As to the date of March 27th 1880, we have to say that we see nothing in the evidence respecting it. Besides, it is shown affirmatively that the plaintiff moved upon the premises after that date, to wit, in April of that year; and, what is more, the evidence shows that no trouble was experienced from the water until several months later. It is true, the plaintiff took an assignment from her grantor of his claim for damages, but the evidence fails to show that he sustained any. The plaintiff's right of recovery for diminution in the value of the use of the premises should have been limited to the time during which it was proven that the nuisance existed. In the instruction given it appears to us that the court erred.

Reversed.

We have been unable to find any case where the precise question involved in the principal case has been decided. Upon principle, however, it seems clear that it is but a new application of the familiar maxim: *Sic utere tuo, ut alienum non lædas:* Broom's Legal Maxims *357.

As a general proposition "a landowner may [it is said] change the grade of its surface, and, if in the absence of grant, prescription or mutual stipulation, mere surface water or the natural drainage is displaced, obstructed or caused to accumulate upon the adjoining land, or upon a street or highway, no right of action arises:" Gould on Waters, § 267, citing *Luther* v. *Winnisimmet Co.*, 9 Cush. 171; *Morrill* v. *Hurley*, 120 Mass. 99; *Parks* v. *Newburyport*, 10 Gray 28; *Flagg* v. *Worcester*, 13 Id. 601; *Dickinson* v. *Worcester*, 7 Allen 19; *Bangor* v. *Lansil*, 51 Me. 521; *Goodale* v. *Tuttle*, 29 N. Y. 459.

"According to the rule established in Massachusetts and New Jersey, an owner of land may erect structures upon it of any size, height or depth, irrespective of their effect upon mere surface water or the natural drainage:" Gould on Waters, § 268; *Parks* v. *Newburyport*, 10 Gray 28; *Bates* v. *Smith*, 100 Mass. 181; *Bowlsby* v. *Speer*, 2 Vroom 351; *Gannon* v. *Hargadon*, 10 Allen 106.

The rule above stated has not, however, been approved in all of the states. See, generally, Gould on Waters, §§ 267, 268, and cases cited; *Bentz* v. *Armstrong*, 8 W. & S. 40; *Cin., H. & D. Railroad Co.* v. *Ahr*, 2 Cin. 504; *Whitney* v. *Sanders*, 3 Pitts. 226; *Freudenstein* v. *Heine*, 6 Mo. App. 287; *Mellor* v. *Pilgrim*, 3 Brad. (Ill.) 476; 7 Id. 306; *Hicks* v. *Silliman*, 93 Ill. 255.

The case of *Hurdman* v. *N. E. Railway Co.*, L. R., 3 C. P. D. 168, is an instructive case as touching the question involved in the principal case. In that case a statement of claim alleging that the surface of the defendant's land had been artificially raised by large quantities of soil, clay, limestone and other refuse placed thereon close to and adjoining the plaintiff's house, thereby raising the surface of defendant's land above the level of the land upon which the plaintiff's house was built, and that in consequence of such negligence the rain water falling on defendant's land made its way through the defendant's wall into the adjoining house of the plaintiff and caused substantial damage, was held upon demurrer to disclose a good cause of action.

The judgment of the court was delivered by COTTON, L. J., who among other things said: "The heap or mound on the defendant's land must, in our opinion, be considered an artificial work. Every occupier of land is entitled to the reasonable enjoyment thereof. This is a natural right of property, and it is well established that an occupier of land may protect himself by action against any one who allows any filth or any other noxious thing produced by him on his own land to interfere with this enjoyment. We are further of opinion that, subject to a qualification to be hereafter mentioned, if any one, by artificial erection on his own land, causes water, even though arising from natural rainfall only, to pass into his neighbor's land, and thus substantially to interfere with his enjoyment, he will be liable to an action at the suit of him who is so injured, and this view agrees with the opinion expressed by the Master of the Rolls in the case of *Broder* v. *Saillard*, L. R., 2 Ch. D. 700. I have limited this statement of liability to liability for allowing things in themselves offensive to pass into a neighbor's property, and for causing by artificial means things in themselves inoffensive to pass into a neighbor's property to the prejudice of his enjoyment thereof, because there are many things which when done on a man's own land (as building so as to interfere with the prospect or so as to obstruct lights not ancient) are not actionable, even though they interfere with a neighbor's enjoyment of his property. * * * The owner of land holds his right to the enjoyment thereof, subject to such annoyance as is the consequence of what is called the natural user by his neighbor of his land, and when an interference with this

enjoyment by something in the nature of a nuisance (as distinguished from an interruption or disturbance of an easement or right of property in ancient lights, or the support for the surface to which every owner of property is entitled) is the cause of complaint, no action can be maintained if this is the result of the natural user by a neighbor of his land."

In *Wilson* v. *Waddell*, L. R., 2 App. Cas. 99, the seam of coal of the defendant cropped out at the surface and entered the plaintiff's holding at a depth of many fathoms below the surface. The defendant by working his seam caused a subsidence of the surface and a consequent flow of rainfall into the adjacent lower coal field of plaintiff; and it was held that the damage, being entirely caused by gravitation and percolation, offered no ground of action. In giving his opinion in this case Lord BLACKBURN said: "The general rule of law in both countries [Scotland and England] is that the owner of one piece of land has a right to use it in the natural course of user, unless in so doing he interferes with some right created either by law or contract; and as a branch of that law, the owner of the minerals has a right to take away the whole of the minerals in his land, for such is the natural course of user of minerals, and that a servitude to prevent such an user must be founded on something more than mere neighborhood." *Rylands* v. *Fletcher*, L. R., 3 H. L. 338, is cited in support of this opinion. In the latter case Lord Chancellor CAIRNS said: "The occupiers of a close might lawfully have used that close for any purpose for which it might in the ordinary course of the enjoyment of land be used; and if, in what I term the natural user of that land there had been any accumulation of water either on the surface or underground, and if by the operation of the laws of nature that accumulation of water had passed off into the close occupied by the plaintiff, the plaintiff could not have complained that that result had taken place. If he had desired to guard himself against it, it would have lain upon him to have done so by leaving or by interposing some barrier between his close and the close of the defendants in order to have prevented that operation of the laws of nature."

In *Broder* v. *Saillard*, L. R., 2 Ch. D. 692, 700, where it was held that the occupier of a house is liable for allowing the continuance on his premises of any artificial work which causes a nuisance to a neighbor, even though it was put there before he took possession, JESSEL, M. R., in delivering his judgment said: "The second conclusion I came to on the question of fact is that if the made earth had not been there and if the soil pipe had not been broken, the dampness in question would not have arisen; in other words, I consider the dampness to arise from the contiguity of the made earth, and the nature of it to be altered, and the extent of it to be increased, as Mr. I'Anson says, by the defect in the soil-pipe. The result is that the defendant must be held liable. As I understand, in the case of the soil-pipe there is no question about it, but as regards the wet, where does the wet come from? I have no doubt it comes in part, if not entirely, from the water used in working the horses and so on, for a great deal of water is used in stables. It was suggested to me it might come from the rain, and therefore that word was put in the bill; but it appears to me the most probable origin of the water is the water used in the stable. But however it comes, if it comes through an artificial work which collects it, in the nature of a large artificial sponge which absorbs it and keeps it together, until it oozes out by reason of the nature of the sponge, it appears to me, I have to say, that an artificial work, a work made by man is a work which if it causes a nuisance is a thing for which the

owner of the land is responsible. That is what it comes to. Now Mr. Campbell, who was examined on other points, also said, as regards this made earth, of course it would give away water in a very different manner from virgin clay which had never been disturbed, and he does confirm the view I should have taken independently of his evidence, that the made earth was the chief cause of the mischief, perhaps not the sole cause. That being so, I think, both on principle and authority, the lessee in possession of the house where the artificial work is, ought to be responsible for the nuisance occasioned by the existence of that artificial work. Therefore, even independently of the soil-pipe, I should have thought, and still think, the defendant must be liable to put an end to the nuisance." As touching more or less upon the point decided in the principal case, see, also, *Barring* v. *Commonwealth*, 2 Duv. 95. *Vanderwiele* v. *Taylor*, 65 N. Y. 341; *Morrill* v. *Hurley*, 120 Mass. 99; *Freudenstein* v. *Heine*, 6 Mo. App. 287; *Whitney* v. *Sanders*, 3 Pitts. 226.

Although none of the cases above referred to decide the precise point involved in the principal case, they throw much light upon the principles involved therein, and upon principle there would seem to be no reasonable doubt as to the correctness of its decision.

MARSHALL D. EWELL.

Chicago.

Court of Errors and Appeals of Maryland.

THE CUMBERLAND VALLEY RAILROAD CO. *v.* MAUGANS.

In order to justify the court in withdrawing a question of negligence from the jury and deciding it a matter of law, the case must be a very clear one, presenting some prominent and decisive act in regard to the effect and character of which no room is left for ordinary minds to differ.

It is not always as a matter of law, negligence and want of ordinary care for a person to attempt to step from a car when it is in motion.

A young man in vigorous health, strong, active and in full possession of all his physical and mental faculties, having a valise containing clothing in his right hand and a basket of provisions on his left arm, attempted in broad daylight, to leave a railway train while it was moving slowly, the distance from the lower step of the car to the platform being only eighteen inches, and in doing so was seriously injured. In an action of damages against the railroad company, *Held*, that under the circumstances, in voluntarily stepping from the car when it was in motion, and when he had not the free and unrestricted use of his hands and arms, the plaintiff was not guilty of such negligence as would justify the court in taking the case from the consideration of the jury.

APPEAL from the Circuit Court for Washington county.

This was an action brought by the appellee to recover damages from the appellant for injuries he sustained through its negligence, while stepping from one of its cars at Green Castle, a station on its road. The plaintiff testified that he got upon a train of the